

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 94-20

March 14, 1994

TO: All Regional Directors, Officers-in Charge,
and Resident Offices

FROM: William G. Stack, Associate General Counsel

SUBJECT: Filing Objections To Discharge Complaints Under
Section 727(a) and Nondischargeability Complaints
Under Section 523(a)(6) of the Bankruptcy Code

In all cases in which the respondent has filed for bankruptcy, Regions should consider whether there is a basis for filing a complaint objecting to discharge under Bankruptcy Code Section 727(a) and/or a complaint asserting nondischargeability of the respondent's debt to the Agency under Section 523(a)(6) of the Code, and promptly refer to the Special Litigation Branch those cases which appear to warrant either action. The purpose of this memorandum is to describe Sections 727(a) and 523(a)(6), the types of debtors covered and applicable time deadlines, so that cases which these Sections arguably cover are brought to the attention of the Special Litigation Branch in a timely manner.

As set forth in more detail herein, Section 727(a) establishes several bases for objecting to discharge, where a debtor has, *inter alia*, misrepresented or concealed relevant information concerning its financial status. Section 523(a)(6) excepts from discharge those debts which arose from "willful and malicious" injury to another. Although no court has specifically addressed whether violations of the National Labor Relations Act may constitute "willful and malicious" injuries under 523(a)(6), Section 8(a)(3) violations and other violations involving animus directed toward protected activity would appear to be encompassed by those terms.

The respondent's filing of a bankruptcy petition automatically stays the Board's collection of money from the respondent (Section 362(a)), and if the bankruptcy court grants the respondent a discharge, the Board will be foreclosed from collecting further from the respondent regardless of how much the respondent still owes the Board. The reason for filing the aforementioned complaints is to cause the bankruptcy court to deny the respondent a discharge generally, or at least permit the Board to resume its collection efforts against the respondent.

Types of Debtors Covered

Corporate and individual debtors (including sole proprietorships) may file for bankruptcy under Chapter 7 (liquidation) or 11 (reorganization) of the Bankruptcy Code, and individual debtors may also file under Chapter 13 (individual with regular income). The applicability of the exceptions to discharge set forth in 727(a) and 523(a)(6) to debtors in Chapter 7, 11 and 13 cases is set forth in the charts below.

Section 727(a)

	Chapter 7	Chapter 11	Chapter 13
Individuals	Applicable in all cases.	Only applicable to debtors operating business where reorganization plan is a "liquidating plan." Not applicable in all other cases.	Not applicable.
Corporations	Section 727(a)(1) limits discharge to individual debtors.	Only applicable to corporate debtors where reorganization plan is a "liquidating plan." Not applicable in all other cases.	Chapter 13 is not applicable to corporate debtors.

Section 523(a)(6)

	Chapter 7	Chapter 11	Chapter 13
Individuals	Applicable in all cases.	Applicable in all cases.	Only applicable where debtor seeks a discharge under 1328(b) because debtor has not completed payments under Chapter 13 plan.
Corporations	Not applicable.	Not applicable.	Chapter 13 is not applicable to corporate debtors.

Nondischargeability Under Bankruptcy Code Section 727(a)

Under 727(a), covered debtors may be denied a discharge as to all debts based, *inter alia*, on the following grounds:

(1) the debtor, with the intent to hinder, delay or defraud a creditor, has transferred, destroyed or concealed property of the debtor within one year before the date of the filing of the petition or after the filing of the petition (727(a)(2));

(2) the debtor has concealed, destroyed, falsified or failed to keep recorded information from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified (727(a)(3));

(3) the debtor knowingly and fraudulently made, in connection with the bankruptcy case, a false oath or account, or presented a false claim (727(a)(4));

(4) the debtor has failed satisfactorily to explain the loss of assets or deficiency of assets to meet the debtor's liabilities (727(a)(5));

(5) the debtor has refused to obey any lawful order of the bankruptcy court (727(a)(6));

(6) the debtor was granted a discharge under Chapter 7 or 11 within six years before the date of the filing of the petition (727(a)(8)), or was granted a discharge under Chapter 13 within six years before the date of the filing of the petition, unless payments under the debtor's Chapter 13 plan totaled 100% of the allowed unsecured claims, or 70% of such claims and the plan the debtor proposed was the debtor's best effort (727(a)(9)).

Nondischargeability Under Bankruptcy Code Section 523(a)(6)

Section 523(a)(6) provides that a debtor in bankruptcy will be denied a discharge as to debts arising from "willful and malicious" injury to another. Under the majority view, the term "willful" requires only that the debtor commit an intentional act which necessarily results in an injury, and thus requires no specific intent to injure.¹ With respect to the term "malicious", the generally accepted view is that in circumstances where it is reasonably foreseeable that the debtor's conduct will result in injury, and the debtor has acted without just cause or excuse, it may be presumed that the debtor acted with malice.² Section 8(a)(3) violations and other violations based on animus directed toward protected activity involve intentional acts which necessarily result in injury, and in circumstances where the respondent has acted without just cause or excuse. Accordingly,

¹ See, e.g., In re Briton, 950 F.2d 602 (9th Cir. 1991); Perkins v. Scharffe, 817 F.2d 392, 393-394 (6th Cir.), cert. denied, 484 U.S. 853 (1987); St. Paul Fire & Marine Insurance Co. v. Vaughn, 779 F.2d 1003 (4th Cir. 1985); Kelt v. Quezada, 718 F.2d 121 (5th Cir. 1983), cert. denied, 467 U.S. 1217 (1984).

² See, e.g., In re Littleton, 942 F.2d 551, 554-555 (9th Cir. 1991); In re Grey, 902 F.2d 1479, 1481 (10th Cir. 1990); Wheeler v. Landau, 783 F.2d 610, 615 (6th Cir. 1986); Seven Elves, Inc. v. Eskenazi, 704 F.2d 241, 245 (5th Cir. 1983); In re Patrick, 143 B.R. 200, 202-203 (N.D.Ill. 1992); In re Kallmeyer, 143 F.2d 271, 273-274 (D.Kan. 1992).

damages resulting from such violations arguably involve "willful and malicious" injuries excepted from discharge under 523(a)(6).³

Time For Filing Claims of Nondischargeability

Complaints objecting to discharge under 727(a), and nondischargeability complaints under 523(a)(6), must be filed within the deadlines set forth in the chart below.

Filing Deadlines

	Chapter 7	Chapter 11	Chapter 13
Section 727(a)	Within 60 days following first date set for meeting of creditors.	Prior to first date set for hearing on confirmation.	Not applicable.
Section 523(a)(6)	Within 60 days following first date set for meeting of creditors.	Within 60 days following first date set for meeting of creditors.	Court will issue order setting deadline.

The Region should be alert to the existence of circumstances warranting the filing of a complaint objecting to discharge under 727(a), and the filing of a complaint of nondischargeability under 523(a)(6). Any case which appears to be covered by either of these Sections should be promptly referred to the Special Litigation Branch for further consideration.


W.G.S.

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³ At least two courts have addressed analogous claims based on violations of federal civil rights statutes, and have found such claims to be nondischargeable as damages resulting from "willful and malicious" injuries. See In re Moore, 1 B.R. 52 (C.D.Cal. 1979); In re McGuffey, 145 B.R. 582 (N.D.Ill. 1992).